No. 04-1144

Supreme Court, U.S.
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In The Supreme Court of the United States

KELLY AYOTTE, Attorney General
of the State of New Hampshire,

Petitioner,

v.

PLANNED PARENTHOOD OF
NORTHERN NEW ENGLAND, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF *AMICI CURIAE* NEW HAMPSHIRE REPRESENTATIVE AND HB 763 SPONSOR KATHLEEN SOUZA, NEW HAMPSHIRE SENATORS JOHN S. BARNES, JR., ROBERT K. BOYCE, ROBERT J. LETOURNEAU, AND SHEILA ROBERGE, AND NEW HAMPSHIRE REPRESENTATIVES MICHAEL A. BALBONI, PETER BATULA, DAVID J. BETTENCOURT, DAVID L. BUHLMAN, HARRIET E. CADY, PAUL C. INGBRETSON, DANIEL C. ITSE, ROGERS J. JOHNSON, PHYLLIS M. KATSAKIORES, THOMAS J. LANGLAIS, ROBERT J. L'HEUREUX, PAUL MIRSKI, RICHARD W. MORRIS, SANDRA J. REEVES, AND ROBERT H. ROWE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici, as New Hampshire Senators and Representatives, have a unique interest in the outcome of this case. On June 19, 2003, the Governor of New Hampshire signed into law House Bill 763 (HB 763), the parental notice statute before this Court. *Amicus* Representative Kathleen Souza was a sponsor of HB 763 and, as such, maintains a special interest in the constitutionality of the statute. It was her intent, as well as the intent of her co-sponsors, to protect minors against their own immaturity, to foster the family structure and preserve it as a social unit, and to protect the rights of parents to rear their children.

Amici Senators John S. Barnes, Jr., Robert K. Boyce, and Sheila Roberge, along with Representatives Michael A. Balboni, Peter Batula, David L. Buhlman, Harriet E. Cady, Paul C. Ingbretson, Daniel C. Itse, Rogers J. Johnson, Phyllis M. Katsakiores, Robert J. L'Heureux, Richard W. Morris, Sandra J. Reeves, and Robert H. Rowe each voted in favor of the bill. These Senators and Representatives, along with the nine Senators and 185 Representatives that voted along with them, agreed that the State has compelling interests in protecting minors and families.[2] *Amici* Senator Robert Letourneau and Representatives David J. Bettencourt, Thomas J. Langlais, and Paul

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[1] This brief is filed with the written consent of the parties. Letters of consent have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part. No entities other than the *Amici* or their counsel have made a monetary contribution to the preparation or submission of this Brief.

[2] *See* Appendix at App. 1 for the New Hampshire Legislature's findings of fact.

Mirski were elected after HB 763 passed, but each affirms the Legislature's intent in passing the bill.

Due to the confusion among the courts across the country and the First Circuit's use of strict scrutiny in striking down New Hampshire's parental notification statute, *Amici* are left with nothing to guide them except speculation in enacting statutes concerning abortion. Consequently, *Amici* file this brief on behalf of Petitioner, urging this Court to reverse the judgment of the lower court.

SUMMARY OF ARGUMENT

Twenty-four years after this Court first upheld a parental notice statute and rejected an as-applied challenge in *H.L. v. Matheson*, 450 U.S. 398 (1981), the Court is once again faced with an overreaching federal court decision striking down a substantially similar parental notice law. Central to this Court's decision is the proper standard of review to apply in the facial challenge to the parental notice statute. In a long line of cases prior to *United States v. Salerno*, 481 U.S. 739 (1987), this Court defined a statute as facially invalid only if it was "invalid in all its applications."

This Court has repeatedly emphasized that the States possess compelling interests in the protection of minors and maternal health. Yet despite the Court's repeated recognition of such interests, it and the courts below have applied an analysis tantamount to strict scrutiny in repeatedly striking down reasonable, common sense laws that attempted to protect those interests. The First Circuit's complete failure to consider New Hampshire's

interests in the parental notice law demonstrates the courts' utilization of the strictest scrutiny in analyzing such laws.

Furthermore, the standard set forth in *Planned Parenthood v. Casey* – that an abortion provision is unconstitutional if, "in a large fraction of the cases [the provision] will operate as a substantial obstacle" to abortion – has sown considerable confusion among the lower courts and state legislatures. 505 U.S. 833, 895 (1992). Due to the speculative nature of the *Casey* "large fraction" standard, plaintiffs are encouraged to rely on speculation, and federal judges and state lawmakers are left to simply guess at the constitutionality of a regulation.

Finally, the substantial health risks to minors render it unjustifiable to exempt state parental notice laws from the traditional facial challenge standard. In this context, the overbreadth doctrine would undermine thorough review of such facial challenges and would eviscerate the States' compelling interests.

Because the traditional facial challenge standard is consistent with prior case law and is necessary to protect the compelling interests that this Court has itself identified, the Court should reaffirm the traditional facial challenge standard. As the New Hampshire law is not invalid in all its applications, the Court should reverse the lower court's decision.

ARGUMENT

I. THIS COURT SHOULD REAFFIRM THE TRADITIONAL FACIAL CHALLENGE STANDARD FOR PARENTAL NOTICE LAWS BECAUSE IT IS CONSISTENT WITH PRIOR CASE LAW AND IS NECESSARY TO PROTECT THE STATES' RECOGNIZED COMPELLING INTERESTS.

A. Before *Salerno*, the Court traditionally held that a facial challenge could not succeed unless the statute was "invalid in all its applications."

In *United States v. Salerno*, the Court articulated the following standard of review for facial challenges:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

Salerno, 481 U.S. 739, 745 (1987).[3] This Court and its Justices have used the following various terms to refer to a facially invalid statute: "void," "void on its face," "invalid *in toto*," or, as in *Marbury v. Madison*, "repugnant to the Constitution."[4] In other words, a facial challenge attacks a

[3] A unanimous Supreme Court relied on *Salerno* in *Anderson v. Edwards*. 514 U.S. 143, 155 n.6 (1995).

[4] *See, e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 495 n.5 (1985); *Missouri Rate Cases*, 230 U.S. 474, 508-09 (1913); *Loeb v.*

(Continued on following page)

statute "*in toto*" and makes it utterly inoperative, necessarily implying that there can be no constitutional application.

Prior to *Salerno*, the phrase commonly used by this Court in explaining this standard was "invalid in all its applications." For example, in *Brockett v. Spokane Arcades, Inc.*, the Court stated, "we are unconvinced that the identified overbreadth is incurable and would taint ***all possible applications*** of the statute. . . ." *Brockett*, 472 U.S. at 504 (emphasis added). The court concluded that there was "no satisfactory ground for striking the statute down in its entirety because of ***invalidity in all of its applications***." *Id.* at 505 (emphasis added).

In *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, the Court pervasively used the "in all its applications" language. 467 U.S. 947 (1984). The Court concluded that the flaw in the statute was not that it included some impermissible applications, but that "***in all its applications***" it operated on a fundamentally mistaken premise. *Id.* at 966 (emphasis added). The Court also noted that the doctrine of "overbreadth" has been used to describe "a challenge to a statute that ***in all its applications*** directly restrict[s] protected First Amendment activity."[5] *Id.* at 966 n.13 (emphasis added).

Columbia Township Tr., 179 U.S. 472, 477-80, 490-92 (1900); *Marbury v. Madison*, 5 U.S. 137, 177, 180 (1803).

[5] The Court stated that facial challenges have been upheld in contexts other than the First Amendment and that, whether a challenge is labeled "overbreadth" or simply a "facial challenge," "the point is that there is no reason to limit challenges to case-by-case 'as applied' challenges when the statute ***on its face and therefore in all its***

(Continued on following page)

That same year, the Court stated in *Members of City Council v. Taxpayers for Vincent* that there are two ways in which a statute may be considered facially invalid: "either because it is unconstitutional ***in every conceivable application***, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'" *Taxpayers for Vincent*, 466 U.S. 789, 796 (1984) (emphasis added). The Court added that "a holding of facial invalidity expresses the conclusion that the statute could ***never be applied in a valid manner***." *Id.* at 797 (emphasis added). The Court also stated that its decisions have repeatedly employed facial invalidation where "***every application*** of the statute created an impermissible risk of suppression of ideas." *Id.* at 798 n.15 (emphasis added).

Likewise, in *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, the Court noted that a facial challenge in the context of overbreadth and vagueness meant that a statute was "***incapable of any valid application***." 455 U.S. 489, 494 n.5 (1982). Thus, to succeed, the complainant must demonstrate that a statute is impermissibly vague ***in all of its applications***. *Id.* at 497.[6]

This "invalid in all its applications" standard is consistent with at least six corollary rules of constitutional law. First, no federal court has "jurisdiction to pronounce

applications falls short of constitutional demands." *Munson*, 467 U.S. at 966 n.13 (emphasis added).

[6] These cases, along with the *Salerno* standard, must be read against the backdrop of the Court's 1971 decision in *Younger v. Harris* regarding facial challenges on First Amendment grounds, where Justice Black acknowledged extreme hesitation in entertaining facial challenges on *any* grounds. *See Younger*, 401 U.S. 37, 52-53 (1971).

any statute . . . void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." *United States v. Raines*, 362 U.S. 17, 21 (1960) (quoting *Liverpool, N.Y. & Philadelphia S.S. Co. v. Comm'r of Emigration*, 113 U.S. 33, 39 (1885)). Second, federal courts should never "anticipate a question of constitutional law in advance of the necessity of deciding it." *Brockett*, 472 U.S. at 501 (quoting *Raines*, 362 U.S. at 21). Third, a federal court should never "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.*

Fourth, it is an "elementary principle" that a statute may be constitutional in part and unconstitutional in part and, if the constitutional part is independent of the unconstitutional part, the constitutional part may stand, while only the unconstitutional part is rejected. *Id.* at 502. Fifth, the "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."[7] *Raines*, 362 U.S. at 21. This Court has developed various reasons for this rule, including the fact that it is undesirable to consider every conceivable situation which might arise in applying complex and comprehensive legislation. *Id.*[8] Finally, in evaluating a

[7] The exception to this rule is First Amendment overbreadth. *See Schaumburg v. Citizens for Better Env't*, 444 U.S. 620, 634 (1980).

[8] *See also Munson*, 467 U.S. at 955 (stating that the rule frees the Court from unnecessary pronouncements on constitutional issues as well as from premature interpretations of statutes) (quoting *Raines*, 362 U.S. at 22).

facial challenge, a court must consider any limiting construction proffered by a state court or enforcement agency. *Kolender v. Lawson*, 461 U.S. 352, 355 (1983) (quoting *Flipside*, 455 U.S. at 494 n.5). This rule is necessary because the limiting construction may allow at least one valid application. Each of these corollary rules of constitutional law reinforces the use of the "invalid in all its applications" standard [hereinafter "traditional facial challenge standard"].[9]

This Court has previously applied the traditional facial challenge standard in upholding abortion regulations against facial challenges. *See Planned Parenthood v. Casey*, 505 U.S. 833, 885-87 (1992) (upholding Pennsylvania's 24-hour waiting period, despite its effect on "some women"); *Rust v. Sullivan*, 500 U.S. 173, 183 (1991) (applying *Salerno*); *Ohio v. Akron Ctr. for Reprod. Health* (*Akron II*), 497 U.S. 502, 514 (1990) ("[B]ecause appellees are making a facial challenge to a statute, they must show that 'no set of circumstances exists under which the Act would be valid.'") (quoting *Webster v. Reprod. Health Serv.*, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring)); *Webster*, 492 U.S. at 524 (O'Connor, J., concurring) (quoting *Salerno*). *See also Hodgson v. Minn.*, 497 U.S. 417, 444-45 (1990) (stating that a statute requiring a minor to wait 48 hours after notifying a parent of her intent to get an abortion would reasonably further a legitimate state interest). This Court should do so in this case as well.

[9] These six corollary rules, along with the long line of cases applying the "invalid in all its applications" standard, refute the notion that individuals, in the abstract, have a "right to be judged by a constitutionally valid rule of law." *See* Michael C. Dorf, *Facial Challenges to State & Federal Statutes*, 46 STAN. L. REV. 235, 242 (1994). Even if one concedes that the Constitution "permits only the application of constitutional rules," it begs the question: application to whom and in what circumstances? *See* Kevin Martin, Note, *Stranger in a Strange Land: The Use of Overbreadth in Abortion Jurisprudence*, 99 COLUM. L. REV. 173 (1999) (providing a point by point response to the Dorf article).

B. The traditional facial challenge standard is necessary to protect important and legitimate state interests that this Court has repeatedly recognized.

For 32 years, this Court and its individual Justices have repeatedly stated that the States have important, even "compelling," interests in the protection of minors and the regulation of abortion. In fact, the Court has unanimously agreed that "there is a compelling interest in protecting the physical and psychological well-being of minors." *Sable Communications of Ca., Inc. v. FCC*, 492 U.S. 115, 126 (1989). *See also United States v. Am. Library Ass'n*, 539 U.S. 194, 218 (2003) (Breyer, J., concurring) (recognizing that protecting minors from harm is a legitimate and often compelling interest).

In *H.L. v. Matheson*, the Court concluded that a Utah parental notification statute "serve[d] important state interests." *Matheson*, 450 U.S. 398, 413 (1981). The Court also stated that the inhibition of *some* minors from seeking abortions was not a valid basis to void the statute. *Id.* Justice Stevens noted that Utah's interest in the welfare of its young citizens was "*fundamental* and *substantial*" and "justifie[d] a variety of protective measures." *Id.* at 421 (Stevens, J., concurring) (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 102-03 (1976)) (emphasis added). Additionally, in an opinion authored by Justice Kennedy, the Court in *Akron II* recognized that a State may require a physician himself to take reasonable steps to notify a minor's parent, as a parent will often provide important

medical data and better advice to a minor. *Akron II*, 497 U.S. at 518-19 (citing *Matheson*, 450 U.S. at 411).

Justice O'Connor recognized that States have *compelling* interests in the areas of health and maternal safety and that these interests are present *throughout pregnancy*. *Akron v. Akron Ctr. for Reprod. Health* (*Akron I*), 462 U.S. 416, 459-60 (1983) (O'Connor, J., dissenting); *see also Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting) (quoting her dissent in *Akron I*). Justice O'Connor also explained that the standard of strict scrutiny is not to be applied unless there is an undue burden on the pregnant mother – and that such burdens are only present in situations "involving *absolute* obstacles or *severe* limitations on the abortion decision." *Akron I*, 462 U.S. at 462-64 (O'Connor, J., dissenting) (emphasis added); *see also Thornburgh*, 476 U.S. at 828-29 (O'Connor, J., dissenting).

Furthermore, the plurality in *Casey* affirmed the States' substantial interest in informing a woman of the health risks of abortion. *Casey*, 505 U.S. at 882-83. In fact, the Court concluded that such interests carry particular force regarding minors. *Id.* at 899 (citing *Hodgson*, 497 U.S. at 448-49 (stating that a brief waiting period provides parents with the opportunity to consult family physicians, to inquire into the competency of a doctor, to discuss the religious or moral implications of abortion, and to provide guidance in evaluating the future impact of the abortion decision)).

In addition, the Court has repeatedly acknowledged the special immaturity of minors in making the abortion decision. *See, e.g., Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (stating that there were three reasons why the constitutional rights of children cannot be equated with

those of adults: the peculiar vulnerability of children, their inability to make critical decisions in an informed, mature manner, and the importance of the parental role in child rearing). *See also id.* at 635 ("[M]inors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.").[10] Indeed, there is a compelling need to protect minors from their lack of judgment in choosing abortion providers.

The plurality in *Casey* concluded that these State interests had "been given too little acknowledgment and implementation by the Court" in the cases following *Roe v. Wade*. *Casey*, 505 U.S. at 871 (citing *Roe v. Wade*, 410 U.S. 113, 162-63 (1973)). Both this Court's prior use of the traditional facial challenge standard as well as its continued support of States' compelling interests justify use of the traditional facial challenge standard in the situation at hand.

C. The New Hampshire parental notice statute is not invalid in all of its applications.

The New Hampshire parental notice statute is not invalid in all of its applications for several reasons. First, abortion is not a fundamental right, and as such the interest in preventing the chilling of speech in the First Amendment overbreadth context is not justified in this

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[10] Justice O'Connor also recognized the substantial interest in the health and welfare of minors. *See Akron I*, 462 U.S. at 453-54, 454 n.1, 459-60 (O'Connor, J., dissenting); *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 505 (1983) (O'Connor, J., concurring in part and dissenting in part).

context.[11] The Court has never referred to abortion as a fundamental right since it decided *Akron I*.[12] In addition, the plurality in *Casey* specifically refuted the use of strict scrutiny analysis in the abortion context. *See Casey*, 505 U.S. at 870-71.

Second, no vagueness challenge is present here that might justify an exception to the traditional facial challenge standard. *See generally Colautti v. Franklin*, 439 U.S. 379 (1979). Just the opposite is true; the medical emergency exception in the New Hampshire statute is challenged as *unconstitutionally narrow*. Third, this Court has not previously demanded the *Doe* "health" exception for any *regulation*, but only for a *prohibition* of abortion. *See, e.g., Carhart*, 530 U.S. at 948 (O'Connor, J., concurring) ("[A] postviability *proscription* of abortion would be invalid absent a health exception. . . . ") (emphasis added).

Fourth, New Hampshire was entitled to rely on the "medical emergency" exception in the Minnesota parental notice statute that this Court upheld in *Hodgson v. Minnesota*. *See generally Hodgson*, 497 U.S. 417. That statute provided that notice was not required if "[t]he attending

[11] *See* Part IV, *infra*. Regardless, New Hampshire's statute is constitutional even under the overbreadth prong mentioned by this Court in *Taxpayers for Vincent*, as the statute is not *substantially* overbroad. *See Taxpayers for Vincent*, 466 U.S. at 796 (stating that a statute may be considered facially invalid if it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally "overbroad"); *see also infra* n.31 & accompanying text.

[12] The Court never referred to abortion as a fundamental right in *Stenberg v. Carhart*. Moreover, *Carhart* dealt with a narrow circumstance – a direct *prohibition* of an abortion procedure – and not a *regulation* of that procedure. *See generally Stenberg v. Carhart*, 530 U.S. 914 (2000).

physician certifies . . . that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice." *Id.* at 426 n.7; *see also* Appendix at App. 7. The Respondents present no evidence that the Minnesota medical emergency exception has had any negative impact that would be solved by an immediate abortion in an abortion clinic.

The narrowness of the New Hampshire medical emergency exception is needed for several reasons.[13] The definition acts as a loophole to avoid parental notice; the precision or breadth of the definition defines the size of that loophole. In addition, the *Doe* definition of "health" is unacceptably broad and would act to destroy the requirement of parental notice. Furthermore, the greater the medical emergency – short of a truly life-threatening emergency – the greater the need for parental notice, because it is the custodial parent who will take care of the minor and be informed about her condition. Finally, none of the conditions outlined in the affidavit filed by the abortion provider in this case warrants an immediate abortion as the proper medical response. Abortion clinics are not equipped to deal with such urgent conditions, and any minor would be properly advised to go to an emergency room and not an abortion clinic.

For these reasons, Respondents cannot demonstrate that the New Hampshire statute is invalid in all its applications. In fact, Respondents cannot demonstrate that the statute is invalid in *any* application.

[13] As Justice Kennedy observed in *Carhart*, "[a] ban which depends on the 'appropriate medical judgment' of Dr. Carhart is no ban at all. . . . This, of course, is the vice of a health exception resting in the physician's discretion." *Carhart*, 530 U.S. at 972 (Kennedy, J., dissenting).

II. THE COURTS' APPLICATION OF THE *CASEY* "LARGE FRACTION" STANDARD IS TANTAMOUNT TO THE STRICT SCRUTINY THIS COURT REPUDIATED IN *CASEY*

Despite this Court's repeated recognition of States' interests in the protection of minors and maternal health, it and the courts below have repeatedly struck down reasonable, common sense laws that attempted to protect those interests. Indeed, it was the federal courts' drastic use of strict scrutiny in abortion regulation cases that the *Casey* plurality found problematic, leading to the overturning of *Akron I* and *Thornburgh*. *See Casey*, 505 U.S. at 870 ("[W]e must overrule those parts of *Thornburgh* and *Akron I* which . . . are inconsistent with *Roe's* statement that the State has a legitimate interest. . . ."). The plurality upheld *Roe's* "essential holding" that a State has "legitimate interests from the outset of the pregnancy in protecting the health of the woman. . . ." *Id.* at 846. The plurality held that the States' interests had been given too little acknowledgment and implementation by the Court and concluded that not all of the post-*Roe* cases could be reconciled with the holding in *Roe* that a State has legitimate interests. *Id.* at 871.

Unfortunately, in the wake of *Casey* and *Carhart*, the federal courts are again reviewing abortion regulations under a standard tantamount to strict scrutiny. In fact, the courts do not even take the States' interests – compelling or not – into consideration at all. In essence, the federal courts[14] – including this Court[15] – have returned to

[14] *See, e.g., Planned Parenthood v. Owens*, 287 F.3d 910, 918 (10th Cir. 2002) (stating that the "undue burden" standard did not apply to the question of whether a health exception is required in an abortion

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the strict scrutiny standard urged in Justice Blackmun's dissent in *Casey*. *Casey*, 505 U.S. at 934 (Blackmun, J., concurring in part and dissenting in part) ("Application of the strict scrutiny standard results in the invalidation of all the challenged provisions.").

The First Circuit is guilty of the same. In evaluating New Hampshire's parental notification statute, the First Circuit solely considered the "large fraction-relevant group-substantial obstacle" standard used in one portion of the *Casey* opinion [hereinafter "*Casey* 'large fraction' standard"]. *Planned Parenthood v. Heed*, 390 F.3d 53, 57-58 (1st Cir. 2004); *see also Casey*, 505 U.S. at 895 ("[I]n a large fraction of the cases in which [the particular provision] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."). In doing so, the First Circuit struck down as unconstitutional a parental notice statute which, ironically, is substantially identical to the statute this Court upheld in *Hodgson*. *See Hodgson*, 497 U.S. at 423-27 nn.1-9; *see also* Appendix at App. 6-9.[16]

statute and concluding that "the current state of the law is that state abortion regulations must provide an exception for the protection of the health of pregnant women. . . .").

[15] In *Carhart*, Justice Kennedy maintained that the Court was turning back to post-*Roe* and pre-*Casey* standards by applying the strict scrutiny standard that *Casey* rejected. *See Carhart*, 530 U.S. at 968-69 (Kennedy, J., dissenting).

[16] Also ironic is the fact that the plurality in *Casey upheld* the parental consent statute at issue in that case – and did not apply the "large fraction" standard in doing so. *Casey*, 505 U.S. at 899. *Casey* involved a parental *consent* statute, while *Hodgson* involved a parental *notification* statute – and the Court in *Casey* never questioned the result in *Hodgson*.

The First Circuit did not in any way consider the State's interests in its analysis of New Hampshire's parental notification statute.[17] The court concluded that "a statute regulating abortion must contain a health exception in order to survive constitutional challenge" – without *any* consideration of the State's interests. *Heed*, 390 F.3d at 59. After noting that this Court in *Carhart* could not "see how the interest-related differences could make any difference to the . . . application of the 'health' requirement," the First Circuit concluded the following:

> Thus, ***regardless of the interests*** served by New Hampshire's parental notice statute, it does not escape the Constitution's requirement of a health exception.

Id. at 59-60 (citing *Carhart*, 530 U.S. at 931) (emphasis added).[18] However, even strict scrutiny analysis considers the States' compelling interests and does not automatically render a statute unconstitutional. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (stating that the very purpose of strict scrutiny is to take relevant differences into account).

Yet the First Circuit apparently assumed that, contrary to this Court's plain language in previous cases reviewing parental consent and notification statutes, *any*

[17] New Hampshire's interests were outlined in the Legislature's findings of fact in HB 763. *See* Appendix at App. 1. This Court has also repeatedly enumerated such interests in previous abortion decisions. *See* Part I.B., *supra*.

[18] *But see Thornburgh*, 476 U.S. at 829 (O'Connor, J., dissenting) ("I dispute not only the wisdom but also the legitimacy of the Court's attempt to discredit and preempt state abortion regulation *regardless* of the interests it serves and the impact it has.") (emphasis added).

influence on a minor's decision and ability to obtain an abortion is necessarily undue, even if such influences are not "absolute" or "severely limiting."[19] The First Circuit did not consider the State's interests and weigh them as less than a minor's in reaching its ruling – it simply left the State's interests at the wayside, because "*regardless*" of what the State could show the court, the court was going to rule against it. This newly-modified facial challenge standard completely eviscerates the compelling interests every State has in maternal health and the protection of minors. This is the utter essence of the strict scrutiny analysis the plurality in *Casey* repudiated.

III. THE *CASEY* "LARGE FRACTION" STANDARD HAS SOWN CONSIDERABLE CONFUSION AMONG COURTS AND STATE LAWMAKERS

Rather than clearing up the courts' decisions that went "too far" in the wake of *Roe*, *Casey* has simply proven to confuse federal judges as they attempt to apply the "large fraction" standard the plurality utilized in voiding Pennsylvania's spousal notice statute. *See Casey*, 505 U.S. at 895. While the Court had previously applied the *Salerno* "no set of circumstances" standard to abortion regulations in *Webster*, *Akron II*, *Hodgson*, and *Rust*, the plurality in *Casey* applied the *Salerno* standard to some of the Pennsylvania provisions, such as the parental consent regulation, and created the new "large fraction" facial challenge for the spousal notice regulation. Moreover, the plurality did so without overruling or even addressing the future

[19] *See Akron I*, 462 U.S. at 462-64 (O'Connor, J., dissenting); *Thornburgh*, 476 U.S. at 828-29 (O'Connor, J., dissenting).

applicability of *Salerno*. If this Court cannot apply either the *Casey* standard or the traditional facial challenge standard evenly, it is hard to conceive how the lower courts can do so.

This rule – that an abortion provision is unconstitutional if, "in a large fraction of cases [the provision] will operate as a substantial obstacle to a woman's choice to undergo an abortion" – is not capable of general or consistent application by judges or state lawmakers. The three material terms in this new standard – "large fraction," "relevant," and "substantial" – are subjective and ambiguous terms, and even more so in the context of a facial challenge where a court can only guess at the impact of the law.

In utilizing the *Casey* "large fraction" standard, a court must first decide in what situations a law is "relevant." This results in the kind of "worst-case analysis" which the Court had previously declared should be avoided in facial challenges. *Akron II*, 497 U.S. at 514 ("The Court of Appeals should not have invalidated the Ohio statute on a facial challenge based upon a worst-case analysis that may never occur."). In situations concerning parental notice statutes, courts typically include in the relevant group only those minors who do not want to inform their parents. Yet this is a tiny fraction of all minor females in any particular state.[20]

[20] The courts should consider the positive impact of a parental notice law on all minor females, as all minor females are put on notice that if they engage in sex and become pregnant, they cannot obtain abortions without first notifying their parents. Between 1981 and 1986, when the Minnesota parental notice law was in effect, *both* adolescent abortion rates *and* adolescent pregnancy rates fell significantly. *See*

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Second, a court must identify the "large fraction" of this relevant group. Is ten percent a large enough fraction of the relevant group? Or 20 or 30 percent? The plurality in *Casey* gives no instruction as to this question. Finally, a court must speculate as to whether a provision will impose a "substantial obstacle" on this large fraction of the relevant group. Is "substantial" determined by expense, time, or both? May a court simply examine the face of the statute itself, or is it required to assess other factors over which a State legislature has no control, such as political, demographic, geographic, and economic factors, and whether these factors create a substantial obstacle to the effectuation of a woman's abortion decision?

The alleged abandonment of the traditional facial challenge rule and the *Casey* plurality's selective use of the "large fraction" standard has forced the states to counter a morass of speculative claims about what a law might conceivably do if enforced. As one Fifth Circuit decision aptly noted after *Casey*, "[d]espite the recent efforts of a three-justice plurality of the Supreme Court, passing on the constitutionality of state statutes regulating abortion after *Casey* has become neither less difficult nor more closely anchored to the Constitution." *Barnes v. Miss.*, 992 F.2d 1335, 1337 (5th Cir. 1993). Indeed, just four years after *Casey*, the Court itself once again sharply divided

James Rogers et al., *Impact of the Minnesota Parental Notification Law on Abortion and Birth*, 81 AM. J. PUB. HEALTH 294 (1991). This evidence demonstrates that the parental notice law impacted the *entire* group of adolescent females.

over the standard of review in *Janklow v. Planned Parenthood*.[21]

Examples of the confusion created in the wake of *Casey* are ample.[22] In 2002, the Seventh Circuit stated the following:

> When the Justices themselves disregard rather than overrule a decision – as the majority did in *Stenburg*, and the plurality did in *Casey* – they put courts of appeals in a pickle. We cannot follow *Salerno* without departing from the approach taken in both *Stenberg* and *Casey*; yet we cannot disregard *Salerno* without departing from the principle that only an express overruling relieves

[21] *See generally Janklow v. Planned Parenthood*, 517 U.S. 1174 (1996). In his concurrence in *Janklow*, Justice Stevens claimed that the "no set of circumstances" standard was unsupported by precedent and that *Salerno's* "dictum" has been properly ignored in subsequent cases. *Janklow*, 517 U.S. at 1175-76 (Stevens, J., concurring). However, Justice Stevens also declared that in that particular circumstance there was "no need . . . to affirmatively disavow" the language in *Salerno*. *Id.* Noting that the Court has sent mixed signals to the lower courts on the question of *Salerno's* applicability, Justice Scalia stated that *Salerno* has *not* been *consistently* ignored by the Court. *Id.* at 1178, 1178 n.3 (Scalia, J., dissenting).

[22] *See, e.g., Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 164-65 (4th Cir. 2000) (noting "considerable debate among the circuits"); *Planned Parenthood v. Lawall*, 193 F.3d 1042, 1046 (9th Cir. 1999) (O'Scannlain, J., dissenting) (noting the tension between the pre-*Casey* cases and the "mysterious and unexplained deviation" from *Salerno* in *Casey*); *Manning v. Hunt*, 119 F.3d 254, 268 n.4 (4th Cir. 1997) (stating that the circuits are divided in the application of *Salerno*). *See also Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996) (noting that the standard applicable to previability abortion regulations after *Casey* is a matter of some dispute); *Planned Parenthood v. Miller*, 63 F.3d 1452, 1457 (8th Cir. 1995) (stating that the circuits are split regarding whether the Supreme Court has overruled *Salerno* for abortion cases).

> an inferior court of the duty to follow decisions on the books.

A Woman's Choice – East Side Women's Clinic v. Newman, 305 F.3d 684, 687 (7th Cir. 2002), *cert. denied*, 537 U.S. 1192 (2003).

The Fifth Circuit has noted, "[a]s far as we can tell, the Court appears to be divided 3-3 on the *Salerno-Casey debate*, and it would be ill-advised for us to *assume* that the Court will abandon *Salerno* because three members of the Court now desire that result." *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1104 (5th Cir. 1997) (emphasis in the original). As of 2004, the confusion still existed. The Ninth Circuit recognized this confusion and noted that the "large fraction" standard has been labeled "unique." *Planned Parenthood v. Wasden*, 376 F.3d 908, 920 n.9 (9th Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 2791 (March 28, 2005). The Fourth and Fifth Circuits have adhered to the *Salerno* standard, while the Third, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have adopted the "large fraction" standard.

Added to the courts' confusion is the fact that facial challenges are inherently speculative. It is impossible in a facial challenge for a court to *find* that a statute *causes* an "undue burden," as the statute has never gone into effect or been enforced in real situations. By the very nature of the analysis, a court can only guess the possible or likely impact. This speculation is necessarily based upon inferring, theorizing, or predicting the future impact of a statute from incomplete or uncertain evidence. There is no

alternative. However, once a law actually goes into effect, it may have unanticipated consequences.[23]

Such a standard tempts plaintiffs to rely on exaggeration, unsupported theories, and speculation about what the impact of the law *might* be. Under such circumstances, state officials defending the law are put at a distinct disadvantage. Challengers in a facial challenge can drag in every conceivable geographic, political, economic, or social condition in a state – a "parade of horribles," or worst-case scenarios – claiming that the law will cause all of them. To apply the standard in a facial challenge will yield inconsistent results among different States even if the laws are identical on their faces, as each State possesses different geographic, political, economic, and demographic factors. The real legal question should concern the actual impact of the law itself and how fairly state officials have enforced it.[24]

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[23] The decreasing pregnancy rate in Minnesota is an excellent example of unexpected results. *See supra* n.20.

[24] The irony of the application of the "large fraction" facial challenge standard in *Casey* was that the Court ignored the actual experience of Utah, where a spousal notice provision was in effect for 18 years without a single documented incident of related domestic abuse. *See Jane L. v. Bangerter*, 809 F. Supp. 865, 876 (D. Utah 1992), *aff'd in part & rev'd in part on other grounds*, 61 F.3d 1493 (10th Cir. 1995). In its facial analysis of the Pennsylvania spousal provision in *Casey*, the plurality considered all kinds of possible horrific results that the provision could produce, without looking at the actual experience in Utah – which demonstrated the fallacy of the worst-case scenarios speculated by the Court. *See Casey*, 505 U.S. at 887-98. This fallacy is also shown through the experience of the Hyde Amendment, which opponents incorrectly predicted would result in increased maternal deaths. J. Gold & W. Cates, Jr., *Restriction of Federal Funds for Abortion: 18 Months Later*, 69 AM. J. PUB. HEALTH 929 (1979); D.B. Petitti & W. Cates, Jr., *Restricting Medicaid Funds for Abortions:*

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The likelihood of unanticipated consequences is heightened when a self-interested, profit-motivated business, like the abortion industry, is free to claim practically anything it wants about the *possible* impact of a statute. This is the case here, where the court record is devoid of testimony from minors seeking abortion and consists solely of the testimonies of those parties who stand to gain financially if the statute is struck down. The Respondents asked the lower courts to hold the State accountable for a variety of factors over which it has no control (*i.e.*, lack of good communication in families, parents urging their children not to have abortions, etc.) and accept their unsubstantiated claims that these factors create an "undue burden" on a "large fraction" of minors seeking abortions.

For similar reasons, the *Casey* "large fraction" standard makes it virtually impossible for state legislators to reliably predict whether a particular parental notification bill – or any abortion law – will be constitutional. In assessing the constitutionality of an abortion bill, the legislators have to assess how a federal court might evaluate each of the three prongs of the test. They then have to assess how those prongs will be evaluated in the particular geographic, political, economic, and sociological context of their own state. With the courts confused as to the application of the traditional facial challenge standard versus the *Casey* "large fraction" standard, state legislators are left to speculate the constitutionality of their bills.

Projections of Excess Mortality for Women of Childbearing Age, 67 AM. J. PUB. HEALTH 860 (1977).

IV. BECAUSE OF THE SUBSTANTIAL HEALTH RISKS FROM ABORTION TO MINORS, IT IS NOT JUSTIFIABLE TO EXEMPT STATE PARENTAL NOTICE LAWS, LIKE FIRST AMENDMENT OVERBREADTH, FROM THE TRADITIONAL FACIAL CHALLENGE STANDARD.

As documented in amici briefs currently before this Court, abortion entails serious health risks to women of any age, and the immaturity of minors entails special risks. Indeed, medical studies over the last three decades have created substantial data on five significant risks from abortion: increased risk of placenta previa;[25] risk of premature birth in subsequent pregnancies;[26] increased risk of mental distress or suicide;[27] loss of the protective effect of

[25] *See, e.g.*, M.S. Hendricks et al., *Previous Cesarean Section and Abortion as Risk Factors for Developing Placenta Previa*, 25[2] J. OBST. GYN. RES. 137 (Apr. 1999); C.V. Anath et al., *The Association of Placenta Previa with History of Cesarean Delivery and Abortion: A Meta-analysis*, 177 AM. J. OBST. GYN. 1071 (1997); V.M. Taylor et al., *Placenta Previa in Relation to Induced and Spontaneous Abortion: A Population-Based Study*, 82 OBST. & GYN. 88 (1993).

[26] *See, e.g.*, A. Conde-Agudelo et al., *Effect of the Interpregnancy Interval after an Abortion on Maternal and Perinatal Health in Latin America*, 89 INT'L J. GYN. OBST. S34 (Supp. Apr. 2005); C. Moreau et al., *Previous Induced Abortions and the Risk of Very Preterm Delivery: Results of the EPIPAGE Study*, 112[4] BRIT. J. OBST. GYN. 430 (Apr. 2005); P.Y. Ancel et al., *History of Induced Abortion as a Risk Factor for Preterm Birth in European Countries: Results of the EUROPOP Survey*, 19[3] HUMAN REPROD. 734 (Mar. 2004); Brent Rooney & Byron C. Calhoun, *Induced Abortion and Risk of Later Premature Births*, 8[2] J. AM. PHYSICIANS & SURGEONS 46 (Summer 2003).

[27] *See, e.g.*, Jesse Cougle et al., *Depression Associated with Abortion and Childbirth: A Long-Term Analysis of the NLSY Cohort*, 9[4] MED. SCI. MONITOR CR157 (2003); John M. Thorp et al., *Long-Term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58[1] OBST. GYN. SURVEY 67 (Jan. 2003); P.K. Coleman et al., *State-Funded Abortions Versus Deliveries: A Comparison of*

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full-term pregnancies against breast cancer;[28] and increased risk of substance abuse.[29]

Some of the data substantiating these risks was not available when this Court decided *Casey*. One landmark article in 2003 examined medical studies on abortion between 1966 and 2002 in order to assess the long-term physical and psychological health consequences of induced abortion. Thorp, *supra*, at 68-69. The researchers concluded that women contemplating abortion should be informed of the following: their risk of subsequent preterm birth will be elevated; they will lose the protective effect of a full-term delivery on their lifetime risk of breast carcinoma; there are increased rates of placenta previa after abortion; and the disputed independent risk of induced abortion on breast cancer risk. *Id.* at 77. The study also found that induced abortion increases the risks for mood disorders "substantial enough to provoke attempts of self-harm." *Id.* at 67.

Left to their own devices, minors cannot adequately monitor these significant health risks.[30] These significant

Outpatient Mental Health Claims Over Four Years, 72[1] AM. J. ORTHOPSYCHIATRY 141 (Jan. 2002); M. Gissler et al., *Suicides After Pregnancy in Finland, 1987-1994: Register Linkage Study*, 313[7070] BRIT. MED. J. 1431 (Dec. 7, 1996).

[28] *See, e.g.*, Thorp, *supra*; J.R. Daling et al., *Risk of Breast Cancer Among Young Women: Relationship to Induced Abortion*, 86[21] J. NAT'L CANCER INST. 1584 (Nov. 2, 1994).

[29] *See, e.g.*, P.K. Coleman et al., *Substance Use Among Pregnant Women in the Context of Previous Reproductive Loss and Desire for Current Pregnancy*, 10[2] BRIT. J. HEALTH PSYCHOLOGY 255 (May 2005).

[30] Minors also cannot adequately monitor potential substandard credentials of abortion providers or unsafe conditions in clinics.

health risks justify the application of the traditional facial challenge standard to challenges to parental notice and consent statutes. Likewise, these risks justify a strict medical emergency exception. The traditional facial challenge standard is also necessary to focus federal courts on more than simply increasing access to and minimizing the costs of abortion for minors.

Abortion litigation is unique because *Singleton v. Wulff* empowered abortion providers to represent women in abortion litigation and to challenge statutes that regulate the provider in seeking to protect minors. 428 U.S. 106 (1976). In this unique context of abortion litigation, a facial challenge voids a statute completely, vests abortion providers with absolute discretion, and eliminates common sense regulations. Yet if the traditional facial challenge standard is utilized, failure to demonstrate facial invalidity would compel the abortion providers to resort to an as-applied challenge and a real-life factual demonstration involving the particular abortion provider. Requiring such a challenge would appropriately induce the federal courts to ask serious, probing questions about whether a statute is in fact an "undue burden" or any burden at all compared to the benefit it provides. *See Casey*, 505 U.S. at 873-75 (stating that not every burden is undue).

For these reasons, overbreadth doctrine is inappropriate for abortion litigation. It was created in and confined to the First Amendment context because of the unique concern about chilling speech.[31] That concern is not present in

[31] Moreover, overbreadth alone is not enough even in the First Amendment context. Rather, there must be *substantial overbreadth*. *See Broadrick v. Okla.*, 413 U.S. 601, 615 (1973); *Gooding v. Wilson*, 405 U.S. 518, 520-23 (1972). This Court has specifically acknowledged more

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abortion litigation.[32] The medical risks to minors, combined with the unique problem of minors' immaturity, outweigh any concern about "chilling" abortion on demand for minors. Overbreadth in the abortion context would undermine thorough review of challenges to common sense regulations and would eviscerate the compelling interests – such as protecting minors from the heightened risks of placenta previa, premature birth, psychological trauma, and substance abuse[33] – that the States have in common sense regulations.

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than once that "application of the overbreadth doctrine is 'strong medicine' that should be invoked only 'as a last resort.'" *See, e.g., Munson*, 467 U.S. at 958 (quoting *Broadrick*, 413 U.S. at 613). Abortion is not entitled to equivalent protection as an exception to the facial challenge rule.

[32] *See* Part I.C., *supra*.

[33] In addition, there is a compelling need to protect minors from statutory rape and sexual abuse. *See, e.g., Manning*, 119 F.3d at 266 (stating that an injunction of the North Carolina parental consent statute would mean the State would have "one less avenue to discover the sexual abuse of children and [to] take action to protect" the innocent minors).

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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APPENDIX

New Hampshire Parental Notice Statute

§ 173:1 Legislative Purpose and Findings.

I. It is the intent of the legislature in enacting this parental notification provision to further the important and compelling state interests of protecting minors against their own immaturity, fostering the family structure and preserving it as a viable social unit, and protecting the rights of parents to rear children who are members of their household.

II. The legislature finds as fact that:

(a) Immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences.

(b) The medical, emotional, and psychological consequences of abortion are serious and can be lasting, particularly when the patient is immature.

(c) The capacity to become pregnant and the capacity for mature judgment concerning the wisdom of abortion are not necessarily related.

(d) Parents ordinarily possess information essential to a physician's exercise of best medical judgment concerning the child.

(e) Parents who are aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention after the abortion.

III. The legislature further finds that parental consultation is usually desirable and in the best interest of the minor.

§ 173:2 New Subdivision; Parental Notification Prior to Abortion. Amend RSA 132 by inserting after section 23 the following new subdivision:

Parental Notification Prior to Abortion

§ 132:24 Definitions.

In this subdivision:

I. "Abortion" means the use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove an ectopic pregnancy or the products from a spontaneous miscarriage.

II. "Commissioner" means the commissioner of the department of health and human services.

III. "Department" means the department of health and human services.

IV. "Emancipated minor" means any minor female who is or has been married or has by court order otherwise been freed from the care, custody, and control of her parents.

V. "Guardian" means the guardian or conservator appointed under RSA 464-A, for pregnant females.

VI. "Minor" means any person under the age of 18 years.

VII. "Parent" means one parent of the pregnant girl if one is living or the guardian or conservator if the pregnant girl has one.

§ 132:25 Notification Required.

I. No abortion shall be performed upon an unemancipated minor or upon a female for whom a guardian or conservator has been appointed pursuant to RSA 464-A because of a finding of incompetency, until at least 48 hours after written notice of the pending abortion has been delivered in the manner specified in paragraphs II and III.

II. The written notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent.

III. In lieu of the delivery required by paragraph II, notice shall be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and with restricted delivery to the addressee, which means the postal employee shall only deliver the mail to the authorized addressee. Time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.

§ 132:26 Waiver of Notice.

I. No notice shall be required under RSA 132:25 if:

(a) The attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice; or

(b) The person or persons who are entitled to notice certify in writing that they have been notified.

II. If such a pregnant minor elects not to allow the notification of her parent or guardian or conservator, any

judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize an abortion provider to perform the abortion if said judge determines that the pregnant minor is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant minor is not mature, or if the pregnant minor does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parent, guardian, or conservator would be in her best interests and shall authorize an abortion provider to perform the abortion without such notification if said judge concludes that the pregnant minor's best interests would be served thereby.

(a) Such a pregnant minor may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court-appointed counsel, and shall, upon her request, provide her with such counsel.

(b) Proceedings in the court under this section shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interest of the pregnant minor. In no case shall the court fail to rule within 7 calendar days from the time the petition is filed. A judge of the court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting the decision and shall order a record of the evidence to be maintained including the judge's own findings and conclusions.

(c) An expedited confidential appeal shall be available to any such pregnant minor for whom the court denies an order authorizing an abortion without notification. The court shall make a ruling within 7 calendar days from the time of the docketing of the appeal. An order authorizing an abortion without notification shall not be subject to appeal. No filing fees shall be required of any such pregnant minor at either the trial or the appellate level. Access to the trial court for the purposes of such a petition or motion, and access to the appellate courts for purposes of making an appeal from denial of the same, shall be afforded such a pregnant minor 24 hours a day, 7 days a week.

§ 132:27 Penalty.

Performance of an abortion in violation of this subdivision shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification. A person shall not be held liable under this section if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant minor regarding information necessary to comply with this section are bone fide and true, or if the person has attempted with reasonable diligence to deliver notice, but has been unable to do so.

§ 132:28 Severability.

If any provision of this subdivision or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the provisions or applications of this subdivision which can be given effect without the invalid provisions or applications, and to this end, the provisions of this subdivision are severable.

§173:3 Effective Date. This act shall take effect December 31, 2003.

Minnesota Parental Notice Statute[1]

§ 144.343.

(1) Any minor may give effective consent for medical, mental and other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse, and the consent of no other person is required.

(2) Notwithstanding the provisions of section 13.02, subdivision 8, no abortion operation shall be performed upon an unemancipated minor. . . . [u]ntil at least 48 hours after written notice of the pending operation has been delivered in the manner specified in subdivisions 2 to 4.

(a) The notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent.

(b) In lieu of the delivery required by clause (a), notice shall be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and restricted delivery to the addressee which means postal employee can only deliver the mail to the authorized addressee. Time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.

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[1] This statute was upheld in *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

(3) For purposes of this section, "parent" means both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one.

(4) No notice shall be required under this section if:

(a) The attending physician certifies in the pregnant woman's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice; or

(b) The abortion is authorized in writing by the person or persons who are entitled to notice; or

(c) The pregnant minor woman declares that she is a victim of sexual abuse, neglect, or physical abuse as defined in section 626.556. Notice of that declaration shall be made to the proper authorities as provided in section 626.556, subdivision 3.

(5) Performance of an abortion in violation of this section shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification. A person shall not be held liable under this section if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant woman regarding information necessary to comply with this section are bona fide and true, or if the person has attempted with reasonable diligence to deliver notice, but has been unable to do so.

(6) If subdivision 2 of this law is ever temporarily or permanently restrained or enjoined by judicial order,

subdivision 2 shall be enforced as though the following paragraph were incorporated as paragraph (c) of that subdivision; provided, however, that if such temporary or permanent restraining order or injunction is ever stayed or dissolved, or otherwise ceases to have effect, subdivision 2 shall have full force and effect, without being modified by the addition to the following substitute paragraph which shall have no force or effect until or unless an injunction or restraining order is again in effect.

(c)(i) If such a pregnant woman elects not to allow the notification of one or both of her parents or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize a physician to perform the abortion if the judge determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant woman is not mature, or if the pregnant woman does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parents, guardian, or conservator would be in her best interests and shall authorize a physician to perform the abortion without such notification if said judge concludes that the pregnant woman's best interests would be served thereby.

(ii) Such a pregnant woman may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court appointed counsel, and shall, upon her request, provide her with such counsel.

(iii) Proceedings in the court under this section shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman. A judge of the court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting the decision and shall order a record of the evidence to be maintained including the judge's own findings and conclusions.

(iv) An expedited confidential appeal shall be available to any such pregnant woman for whom the court denies an order authorizing an abortion without notification. An order authorizing an abortion without notification shall not be subject to appeal. No filing fees shall be required of any such pregnant woman at either the trial or the appellate level. Access to the trial court for the purposes of such a petition or motion, and access to the appellate courts for purposes of making an appeal from denial of the same, shall be afforded such a pregnant woman 24 hours a day, seven days a week.